**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 19**

**FOWLER GENERAL CONSTRUCTION, INC.**

**Employer**

**and**

**OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 72**

**Petitioner**

**Case 19-RC-273131**

## DECISION AND DIRECTION OF ELECTION

On a petition duly filed under Section 9(c) of the National Labor Relations Act ("Act"), a hearing was held on March 15, 2021, before a hearing officer of the National Labor Relations Board ("Board"). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to the undersigned its authority in this proceeding to determine whether it is appropriate to conduct an election in light of the issue raised by the parties.

Fowler General Construction, Inc. ("Employer") is a general contractor in the construction industry operating out of Richland, Washington, which self-performs certain work. Operative Plasterers and Cement Masons International Association, Local 72 ("Petitioner") seeks to represent a unit of cement mason journeymen and apprentices employed by the Employer in Central Washington, Eastern Washington, and Northern Idaho.[1] There are approximately seven employees in the stipulated bargaining unit.

The only issue in this case is whether Petitioner waived its right to seek conversion of the parties bargaining relationship from one under Section 8(f) of the Act to one under Section 9(a) of the Act.

The Employer contends that Petitioner waived its right to file a petition for representation under Section 9(a). Specifically, the Employer argues that the parties' 2018 compliance agreement and memorandum of understanding, along with Petitioner's conduct, establish a clear, knowing, and unmistakable waiver. Petitioner maintains that no express promise was created when the parties simply struck the recognition language from the compliance agreement.

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[1] The parties stipulated the following unit is appropriate within the meaning of Section 9(b) of the Act.

Included: All full-time and regular part-time cement mason journeymen and apprentices employed by the Employer in Central Washington, Eastern Washington, and Northern Idaho.

Excluded: All other employees, employees represented by other labor organizations, and guards, and supervisors as defined by the Act.

## I. BACKGROUND

### A. Bargaining Relationships under the Act

It is uncontested that the Employer and Petitioner currently have a bargaining relationship governed by Section 8(f) of the Act. Under Section 8(f), a construction industry employer may grant recognition to a union, without regard to the establishment of its majority status, and either party may repudiate the relationship and decline to negotiate or adopt a successor agreement once the contract expires. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988). Further, 8(f) agreements do not bar representation elections under Section 9(c) of the Act. Ibid.; see also, *S. S. Burford, Inc.*, 130 NLRB 1641, 1642 fn. 2 (1961).

On the other hand, if a bargaining relationship is established by proof that a union represents a majority of employees, either by a Board-conducted election or by employer recognition of employees' showing of support, it is governed by Section 9(a) of the Act.[2] A 9(a) relationship continues beyond the expiration or termination of a collective-bargaining agreement unless there is a loss of majority support for the union.

### B. Statement of Facts

The Employer is general contractor responsible for most, if not all, aspects of construction on a given project. In order to fulfill its responsibilities, the Employer subcontracts portions of a project but self-performs other portions, "which requires directly hiring employees based on the needs of the project." At any particular time, depending on the number and types of active projects, the Employer employs between 150 and 230 construction workers.

The Employer operates primarily in three segments of the construction industry—educational, federal, and hospitality. Its education segment performs predominantly commercial prevailing wage work on K-through-12 schools; its hospitality segment typically involves multifamily structures like hotels and apartment; and, its federal division works at the Hanford Nuclear Site under the Hanford Site Stabilization Agreement ("HSSA"). According to Employer Vice President Jeff Durfee, the HSSA is a project labor agreement requiring all craft work performed at the site to be unionized.

From about 2011 through 2016, the Employer had 8(f) agreements with several unions.[3] In 2016, the Employer decided to terminate these bargaining relationships and engage unions on a project-only basis moving forward.

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[2] See also, Sec. 102.33 of the Board's Rules and Regulations (stating contract language alone will not establish majority support in the construction industry).

[3] According to Durfee, these were "Operators, Laborers, and Carpenters."

Around 2017, Petitioner Business Agent Wayne Sumner[4] approached the Employer about signing a collective-bargaining agreement,[5] but the Employer declined.

Around early 2018, a cement mason employed by the Employer at Hanford Nuclear Site performed work for the Employer at other projects not covered by the HSSA. Because the Employer was not signatory to any agreements involving Petitioner outside the HSSA, the cement mason was not eligible for trust fund contributions from work performed at other projects.

In an effort to make the trust fund contributions for the cement mason, the Employer and Petitioner discussed the possibility of a collective-bargaining relationship around May and June 2018. During those discussions, the Employer made it clear that it would only enter into an agreement that it could repudiate, meaning an agreement under Section 8(f) of the Act, and Petitioner stated it was "not interested in building a relationship with [the Employer] by force." The parties also negotiated modifications to Petitioner's standard subcontracting language because the Employer would not sign an agreement that required all subcontractors to be unionized.

On July 2, 2018, the parties executed two documents, a memorandum of understanding ("MOU") and a compliance agreement.[6] Petitioner has multiple versions of its compliance agreement. The version executed by the parties incorporated by reference the terms of the Multi-Craft Construction Labor Agreement ("MCCLA") between Inland Northwest Chapter of the Associated General Contractors of America and Petitioner[7] and also made several modifications. Specifically, the parties' compliance agreement modified Article 15 of the MCCLA, defined trust fund obligations, and specified that either party could terminate the bargaining relationship with at least 60 days' notice prior to the expiration of the current, or any successor, MCCLA. However, the parties further revised the standard compliance agreement by striking the union recognition language establishing Petitioner as the representative of the Employer's employees stating the Employer recognized Petitioner under Section 9(a) of the Act. The parties' MOU further modified subcontracting provisions found in Article 9 of the MCCLA and allowed the Employer to use nonunion subcontractors in certain circumstances. It also provided that the MOU would "remain in force as long as the employer was signatory."

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[4] Sumner is identified in various documents as "Business Manager" or "Business Manager / Agent" of Operative Plasterers and Cement Masons International Association, Local No. 478 or Local Nos. 72 and 478. Neither party contends Sumner does not represent Petitioner or did not represent Petitioner at all relevant times.

[5] The record is not clear on whether Petitioner sought a relationship under Section 8(f) or Section 9(a) of the Act.

[6] The compliance agreement and MOU are between the Employer and Operative Plasterers and Cement Masons International Association, Local Nos. 72 and 478.

[7] At the time of signing, the MCCLA included Operative Plasterers and Cement Masons International Association, Local 478, in addition to Petitioner.

The MCCLA expired on May 31, 2019, and a successor MCCLA is effective from June 1, 2019, to May 31, 2022.[8] Neither the Employer nor Petitioner gave notice to terminate their agreement.

Around December 2020 or January 2021, Petitioner notified the Employer of its intent to file a petition in an attempt to convert the bargaining relationship from 8(f) to 9(a).

The parties have abided by the terms of the MCCLA, as modified by their compliance agreement and MOU.

## II. BOARD LAW

### The Express-Promise Doctrine (*Briggs Indiana* Rule)

Since the early days of the Act, the Board has recognized a union's ability to waive its right to petition for an election to represent a specific group of employees through an express promise not to do so. In *Briggs Indiana Corp.*, 63 NLRB 1270 (1945), the Board found enforceable a union's contractual agreement not to represent specific employees during the term of its collective-bargaining agreement. In *Cessna Aircraft Co.*, 123 NLRB 855 (1959), the Board clarified that the *Briggs Indiana* rule applies "only where the contract itself contains an *express* promise [emphasis in original] on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership." Id. at 857. The *Cessna* Board also specifically noted that "such a promise will not be implied from a mere unit exclusion, nor will the rule be applied on the basis of an alleged understanding of the parties during contract negotiations." Ibid. See also *Walt Disney World Co.*, 215 NLRB 421 (1974) (finding no waiver where express promise was in parties' recognition agreement but not in the recognition language of ensuing collective-bargaining agreement). Subsequently, in *Lexington Health Care Group, LLC*, 328 NLRB 894, 896 (1999), the Board expanded the *Briggs Indiana* rule to extracontractual express promises but reaffirmed the rule will not be applied based on "alleged understanding." The Board reiterated the principles of express-promise doctrine in *UMass Memorial Medical Center*, 349 NLRB 369, 370 (2007) (applying *Briggs Indiana* rule in the context of a self-determination petition).

In *Northern Pacific Sealcoating, Inc.*, 309 NLRB 759 (1992), the Board applied the express-promise doctrine to a parties' 8(f) relationship. In that case, the parties signed a memorandum of agreement binding the employer to the union's then-current master agreement. The memorandum also stated, in relevant part:

> [T]he individual employer waives any right that he or it may have to terminate, abrogate, repudiate or cancel this Agreement during its term, or during the term of any future modifications, changes, amendments, supplements, extensions, or renewals of or to said master agreement; or to file or process any petition before the National Labor Relations Board seeking such termination, abrogation, repudiation or cancellation.

[8] The record does not contain an executed copy of the 2019-2022 MCCLA.

The Board held that "[t]he waiver provision in the memorandum agreement clearly and unmistakably provides that the Employer agreed to waive its right to file a petition (as well as agreeing not to resort to Board processes to terminate the contract)." The Board has not specifically addressed the *Briggs Indiana* rule as applied to union petitions to convert an 8(f) relationship to a 9(a) relationship.

## III. APPLICATION OF BOARD LAW TO THIS CASE

The Employer argues that the parties' striking of the recognition language, along with other conduct, indicates "the Union would waive all of its rights to seek a 9(a) relationship during the term" while Petitioner maintains it did not make any express promises. Both the Employer and Petitioner cite to *Northern Pacific Sealcoating*, above, in support of their respective positions. And, the parties agree that the Board requires an express promise by a union not to seek to represent certain employees in order to dismiss a representation petition.

The record in this case does not contain any language resembling the express promises found in other Board decisions. There is a strikethrough, or absence, of the 9(a) recognitional language in the parties' compliance agreement, but there is no document referencing Petitioner seeking to represent or organize employees or refraining from admitting employees as members. There is no written language that Petitioner will not file or process a petition for the employees at issue or otherwise seek to convert the parties' bargaining relationship from Section 8(f) to Section 9(a). The Employer conflates striking language identifying the bargaining relationship as governed by Section 9(a) with an affirmative promise not to seek such a relationship.

Absent this express language in a written agreement, the Employer contends three factors show an express promise: (1) the language of the parties' compliance agreement and MOU, particularly the strikethrough of union recognition language in the compliance agreement and the fact that the recognition language has not been stricken from any other compliance agreement in the past 11 years; (2) the parties' positions and statements during contract negotiations, including the Employer's desire for the ability to repudiate the bargaining relationship and Petitioner's email that it did not want to build a bargaining relationship by force; and (3) the parties' conduct, specifically the parties have abided by the terms of their agreement and neither party sought to terminate the agreement. Ultimately, its contention relies on two sentences from *Northern Pacific Sealcoating*:

> The Board has long recognized that parties to collective-bargaining agreements may waive certain of their rights, including some fundamental statutory rights. The Board has generally enforced such waivers when they are clear, knowing, and unmistakable, whether they be by contractual provision or by conduct. [Footnote omitted.]

Id. at 759. Therefore, the Employer argues, an express promise can be made by conduct alone or, in this case, by conduct and something less than express language so long as the totality of the circumstances show a "clear, knowing, and unmistakable" waiver.[9]

The Employer highlights Petitioner's statement during negotiations that it did not want to "build a relationship by force," but force is not equivalent to filing a petition. For example, it could just as easily, if not more so, be picketing for recognition. Next, it points out that the parties have abided by the written terms of their agreements, but this is no more than what all parties are required to do under the law. Again, there is no written promise to not seek 9(a) status, and there could be multiple reasons Petitioner did not seek to establish a 9(a) relationship prior to the instant petition, not least of which is that it may not have enjoyed support from a majority of the petitioned-for employees. Assuming a party's conduct could somehow waive its right to seek to represent certain employees, the facts of this case fall well short of showing any intent to forego converting the 8(f) relationship to a 9(a) relationship.

While the Employer states it could "find no reported case law that states that a party must use specific words to waive certain rights," it also provided no case law where a union waived its right to convert an 8(f) relationship to a 9(a) relationship, nor does it cite to any cases where a union's conduct resulted in the Board determining a waiver.[10] I agree there are no exact "magic words" a party must use to waive its rights; however, as has long been the case, to waive the right to represent a group of employees there must be "an *express* promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership" (emphasis in original). *Cessna*, 123 NLRB at 857.

"As the *Briggs Indiana* decision constituted a limitation upon the right of employees to select representatives of their own choosing, its application has always been strictly limited by the Board" (citations omitted). *Badenhausen Corp.*, 113 NLRB 867, 868 (1955). Although the Board's decisions in *Northern Pacific Sealcoating* and *Lexington Health Care Group* do not foreclose the remote possibility that an express promise can somehow be made outside of written language, in over 80 years the Board has never established another standard.

In the instant case, even considering the totality of parties' written language (or lack thereof), their positions and statements during negotiations, and their subsequent conduct under the contract, the evidence is insufficient to establish a "clear, knowing, and unmistakable" waiver by Petitioner.

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[9] Although the Board has occasionally described the express promise as a clear-and-unmistakable waiver, it has never abrogated its holding that the *Briggs Indiana* rule will not be applied based on an "alleged understanding."

[10] The Board cited to only a single case involving a representation petition and waiver by conduct in *Northern Pacific Sealcoating*. Id. at 759 fn. 3 (citing *Sun World, Inc.*, 271 NLRB 49 (1984)). However, that case is easily distinguishable, as the underlying issue involved whether the employer's conduct, including filing two RM petitions, waived its defense that the union failed to timely notify it of its intent to terminate the parties' bargaining agreement.

Accordingly, I find there is no express promise not to seek representational status under Section 9(a) of the Act.[11]

## IV. CONCLUSIONS AND FINDINGS

I have considered the record evidence and the arguments of the parties, and I conclude that it is appropriate to hold an election among the employees in a facility-wide unit as described below.

Therefore, based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[12]

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> **Included:** All full-time and regular part-time cement mason journeymen and apprentices employed by the Employer in Central Washington, Eastern Washington, and Northern Idaho.
>
> **Excluded:** All other employees, employees represented by other labor organizations, and guards, and supervisors as defined by the Act.

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[11] "[I]nasmuch as the waiver of the right to organize under *Briggs Indiana* is an aspect of the Board's contract bar principles, the party asserting the waiver bears the burden of establishing all of the elements necessary to find such a waiver." *Lexington Health Care Group*, 328 NLRB at 900 (citing *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1990)).

[12] As stipulated by the parties:

> The Employer, a State of Washington corporation, with an office and place of business in Richland, Washington, is engaged in the business of general construction. During the last twelve months, a representative period of time, the Employer had gross revenues in excess of $500,000, and purchased and received at its Richland, Washington facility goods valued in excess of $50,000 directly from suppliers located outside the State of Washington.

## DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Operative Plasterers and Cement Masons International Association, Local 72.

### 1. Election Details

The election will be conducted by United States mail.[13] On **Monday, April 12, 2021** the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 19. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote by mail and do not receive a ballot in the mail by **Monday, April 19, 2021**, should communicate immediately with the National Labor Relations Board by either calling the Region 19 Office at (206) 220-6300 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board Region 19 office by **3:00 p.m. (PDT) on Monday, May 10, 2021**. All ballots will be commingled and counted by an agent of Region 19 of the National Labor Relations Board on **Wednesday, May 12, 2021** at **1:00 pm (PDT)** with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count. If, at a later date, it is determined that a ballot count can be safely held in the Regional Office the Region will inform the parties with sufficient notice so that they may attend.

### 2. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision and Direction of Election including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit(s) who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.[14]

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[13] The parties stipulated to a mail-ballot election

[14] The parties stipulated to the *Daniel-Steiny* eligibility formula. *Daniel Construction Co.*, 133 NLRB 264 (1961); *Steiny & Co.*, 308 NLRB 1323 (1992). See also, *Signet Testing Laboratories, Inc.*, 330 NLRB 1 (1999) (holding *Daniel-Steiny* eligibility formula applies to all construction industry employers unless the parties expressly stipulate not to use it).

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are: 1) employees who have quit or been discharged for cause since the designated payroll period; 2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and 3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### 3. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **March 31, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

**4. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

## RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

**Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden.** A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and, therefore, the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: March 29, 2021

*Ronald K. Hooks*

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